

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

RAUL ENCIZO,	)	No. CV-F-05-1426 OWW
	)	(No. CR-F-03-5237 OWW)
	)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER
vs.	)	RAUL ENCIZO'S MOTION TO
	)	VACATE, SET ASIDE OR CORRECT
	)	SENTENCE PURSUANT TO 28
UNITED STATES OF AMERICA,	)	U.S.C. § 2255 (Docs. 1 &
	)	182) AND DIRECTING CLERK OF
	)	COURT TO ENTER JUDGMENT FOR
Respondent.	)	RESPONDENT
	)	
	)	

Petitioner Raul Encizo, proceeding *in pro per*, timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

The United States has filed an opposition to Petitioner's motion.

Petitioner pleaded guilty pursuant to a written Plea Agreement (Doc. 132). The Plea Agreement provided in pertinent part:

1           2. Agreements by the Defendant.

2           ...

3           (b) The defendant agrees to enter a plea of  
4 guilty to the superseding information which  
5 charges him with using a communications  
6 facility to facilitate a drug-trafficking  
7 offense, in violation of Title 21, United  
8 States Code, section 843(b). The defendant  
9 agrees that he is in fact guilty of this  
10 charge and that the facts set forth in the  
11 factual basis of this agreement are true and  
12 accurate.

13           (c) The defendant agrees that he will not  
14 request a sentence less than 36 months and  
15 not request any downward departures or  
16 reductions from his offense level which would  
17 result in a sentence of less than that  
18 amount.

19           ...

20           (h) The defendant is aware that Title 18,  
21 United States Code, Section 3742 affords a  
22 defendant the right to appeal the sentence  
23 imposed. Acknowledging this, the defendant  
24 knowingly waives the right to appeal his  
25 conviction or any sentence (or the manner in  
26 which the sentence was determined) which is  
in accordance with the maximum provided [sic]  
Title 21, United States Code, Section  
841(b) (1) (A) on the grounds set forth in  
Title 18, United States Code, Section 3742 or  
on any ground whatever, in exchange for the  
concessions made by the United States in this  
plea agreement. The defendant also waives  
his right to challenge his conviction,  
sentence or the manner in which it was  
determined in any post-conviction attack,  
including but not limited to a motion brought  
under Title 28, United States Code, Section  
2241 or 2255.

23           On March 7, 2005, Petitioner was sentenced to a term of 41  
24 months. Petitioner did not file an appeal from his conviction or  
25 sentence.

26           Petitioner asserts that he is entitled to relief pursuant to

1 Section 2255 due to the ineffective assistance of counsel at  
2 sentencing. Petitioner asserts that counsel was ineffective  
3 because (1) Petitioner was entitled to a downward departure in  
4 the calculation of his sentence pursuant to *United States v.*  
5 *Booker*, 543 U.S. 220 (2005); (2) counsel failed to seek a  
6 downward departure for aberrant behavior and minor role in the  
7 offense; (3) counsel failed to argue Petitioner's eligibility for  
8 the safety valve; and (4) counsel failed to argue that Petitioner  
9 was not guilty of violating 18 U.S.C. § 843(b) because no  
10 distribution of methamphetamine occurred.

11 A defendant may waive the statutory right to bring a Section  
12 2255 motion challenging his conviction or sentence. The Ninth  
13 Circuit holds that a waiver of the right to file a Section 2255  
14 motion made pursuant to a negotiated plea agreement is  
15 enforceable except with respect to a claim that the waiver or the  
16 plea was involuntary or the result of ineffective assistance of  
17 counsel. *Washington v. Lambert*, 422 F.3d 864, 870-871 (9<sup>th</sup>  
18 Cir.2005), *cert. denied*, 547 U.S. 1074 (2006).

19 Petitioner makes no claim or showing that the waiver of the  
20 right to bring a Section 2255 motion set forth in his Plea  
21 Agreement was involuntary or the result of ineffective assistance  
22 of counsel. Petitioner's waiver is enforceable; Petitioner  
23 cannot seek relief pursuant to Section 2255.

24 For the reasons stated:

25 1. Petitioner Raul Encizo's motion to vacate, set aside or  
26 correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;

1           2. The Clerk of the Court is directed to enter Judgment for  
2 Respondent.

3 IT IS SO ORDERED.

4 Dated: April 28, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE